Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1428

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

PHOENIX NEWSPAPERS, INC. AND EDYTHE JENSEN
Petitioners,

v.

STEVE W. BOSWELL AND JIM MOFFORD
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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ADDITIONAL QUESTION PRESENTED

WHETHER THE ORDER OF A STATE SUPREME COURT ACCEPTING REVIEW OF CERTAIN ISSUES IS "FINAL" AS TO MATTERS EXCLUDED FROM REVIEW SUCH AS TO REQUIRE THE IMMEDIATE FILING OF A PETITION FOR CERTIORARI.

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ARGUMENT

I. A PETITION FOR WRIT OF CERTIORARI IS TIMELY WHEN TAKEN FROM A DECISION SUMMARILY AFFIRMING AN ISSUE ADDRESSED BY AN INTERMEDIATE APPELLATE COURT.

In their Brief in Opposition, respondents question whether the petition for certiorari is timely. Brief in opposition 1. Respondents argue that petitioners should have split their appeal at the time the Arizona Supreme Court granted discretionary review as to some, but not all, of the issues urged by petitioners in that court. Respondents' argument lacks support in both authority and logic. Application of the rule they urge would result in piecemeal appeals to this court.

Contrary to respondents' representations, the record indicates consideration by the Arizona Supreme Court of

the constitutional issues urged in this petition. It is uncontroverted that petitioners sought discretionary review in the Arizona Supreme Court of both the issues urged here and state issues. That court accepted review on August 20, 1985. Order of the Arizona Supreme Court (August 20, 1985), Appendix A, hereto. One week later, in an order scheduling supplemental briefs and oral argument, the court defined and limited the issues to matters not urged in this petition. It is that order to which respondents refer. Order of the Arizona Supreme Court (August 28, 1985), Appendix A to Brief in opposition. Neither order mentions the constitutional issues.

In its subsequent decision, the Arizona Supreme Court summarily affirmed the court of appeals' resolution of the issues urged here:

> The court of appeals held that the trial court should have directed a verdict on the liability issue because defendants had been negligent as a matter of law.
>
> . . .
>
> . . . Approving the court's resolution of the other questions, we granted review solely on the abrogation holding.

Boswell v. *Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186, 55 U.S.L.W. 2399 (1986), Appendix C to Petition for Certiorari at 4c-5c.

> The opinion of the court of appeals is approved as supplemented by this opinion. The judgment of the trial court is reversed and the case is remanded for proceedings consistent with this opinion.

Id. at 24c-25c. By specifically approving the lower court's opinion on the federal issues, the supreme court went well

beyond a mere denial of review, which has no precedential value. *Calvert* v. *Farmers Ins. Co. of Arizona,* 144 Ariz. 291, 297 n.5, 697 P.2d 684 (1985).

Despite the Arizona Supreme Court's continuing jurisdiction of the entire appeal and its subsequent summary ruling on the issues urged here, respondents argue that petitioners should have split their appeal at the time the supreme court limited its active consideration of the issues. The precise question appears to be of first impression.

Administrative concerns support the instant situation. A rule delaying the filing of a petition for certiorari until final review of all issues in the state supreme court comports with the long-standing policy against piecemeal appeals:

> It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional and does not authorize the court below to send up the case, unless all of the matters between the parties to the record have been determined. The cause is not to be sent up in fragments.

Holcombe v. *McKusick,* 20 How. 552, 15 L. Ed. 1020, 1021 (1858) (refusing to review alleged error in an interlocutory appeal to the Supreme Court of the Territory of Minnesota).

The sole authority presented by respondents has nothing to do with the timeliness of a petition to this court. *Stembridge* v. *Georgia,* 343 U.S. 541 (1952), involved a situation in which the Georgia Supreme Court appeared to have declined review of the constitutional issues urged by petitioner solely on the basis of valid state procedural grounds, thus depriving this court of jurisdiction. *Id.* at 546.

Likewise, respondents produce no valid authority supporting their claim that the constitutional issues urged here became "final" at the time the Arizona Supreme Court issued its limiting order. The rule cited by respondents, Ariz. R. Civ. App. P. 23(f), does not address the issue of finality; the rule merely provides a mechanism by which the Arizona Supreme Court can focus its review:

> If the supreme court grants review, its order shall specify the issue or issues which are to be reviewed. The supreme court may order that the parties file additional briefs or that oral argument be heard, or both.

Ariz. R. Civ. App. P. 23(f), Appendix B, hereto.

Contrary to respondents' assertions, there is no "finality" under Arizona law until the supreme court rules upon *all* issues raised on review. No mandate may issue from the court of appeals until all petitions and cross-petitions for review have been denied and the clerk of the court of appeals has been so notified. Ariz. R. Civ. App. P. 24(a)(3), Appendix C, hereto; Ariz. R. Civ. App. P. 23(h), Appendix B, hereto. If the Arizona Supreme Court decides to grant a petition for review, any subsequent mandate will be issued by that court. Ariz. R. Civ. App. P. 24(a)(4), Appendix C, hereto. No separate provision is made for issues the court excludes from review. *See id.*

Until such time as it issues its decisions, the Arizona Supreme Court retains jurisdiction of the entire matter. It may even raise and decide issues sua sponte. *Dombey* v. *Phoenix Newspaper, Inc.*, 150 Ariz. 476, 482, 724 P.2d 562, 568 (1986). It has the entire record before it. Ariz. R. Civ. App. P. 23(g), Appendix B, hereto. Even for purposes of deciding whether to grant review as to some or all of the

issues, the court has considered all briefs filed in the intermediate court as well as the petition and all relevant portions of the record. *See* Ariz. R. Civ. App. P. 23(c), 23(d), Appendix B, hereto. It is in a position to affirm summarily, if it so desires.

In this case, the Arizona Supreme Court went beyond the mere denial of review. It considered all the issues raised in the petition for review and, in its subsequent decision, summarily approved and explicitly adopted the court of appeals' resolution of the federal issues. The petition for certiorari is timely and properly directed to the Arizona Supreme Court.

II. RESPONDENTS' COUNTERSTATEMENT OF THE CASE ONLY EMPHASIZES THE FACTUAL DISPUTE THAT THE APPELLATE COURTS BELOW RESOLVED BY APPLYING AN UNCONSTITUTIONAL PRESUMPTION OF FAULT.

As evidenced by the out-of-context quotations presented by respondents, the reporter and her editors at trial candidly accepted a journalist's responsibility to strive for perfection. Brief in opposition 3-5. Jensen's source, deputy county attorney Stan Munger, accepted no such responsibility. Based on his preparation of the underlying criminal case, Munger refused to believe he could have confused the names of two suspects with the names of two security guards. *Id.* 2. Munger's testimony of belief — based on nothing more than his faith in himself — did not sway the jury.

Contrary to their apparent intention, respondents' counterstatement of facts only emphasizes the issue at trial concerning Munger's credibility. *See* Petition for Certiorari

at 3-5. The appellate courts below resolved the issue contrary to the jury verdict by applying a common law rule that ignores credibility and equates a mistake with a presumptive absence of due care.

ERRATA

A citation at page 11 of the Petition for Certiorari erroneously refers to a footnote. The proper citation is: P. Devlin, *Trial by Jury* 159-60 (1956).

A citation on page 2 of respondents' Brief in Opposition refers to the wrong volume. The correct citation is: *Stembridge* v. *Georgia,* 343 U.S. 541 (1952).

Respectfully submitted,

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APPENDIX A

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

August 23, 1985

RE: STEVE BOSWELL et al vs.
PHOENIX NEWSPAPERS, INC. et al
Supreme Court No. 18159-PR
Court of Appeals No. 1 CA-CIV 6123
Maricopa County No. C-366121

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 20, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review Granted.

FURTHER ORDERED: Motions of Arizona Broadcasters Association, et al and Citizen Publishing Company for Leave to Participate as Amicus Curiae — GRANTED."

Petitioners' [Appellees Phoenix Newspapers/Jensen] filing fee in the amount of $25.00 and Respondents' [Appellants Boswell/Mofford] filing fee in the amount of $15.00 should be remitted within fifteen days.

The Clerk of the Court of Appeals, Division One, Phoenix, shall forward the record to the Clerk of the Supreme Court.

DIANA K. BENTLEY, Acting Clerk

TO: Kraig Marton, Esq., Marton & Hall, P.A.
James F. Henderson, Esq., and Glen Hallman, Esq., Gust, Rosenfeld, Divelbess & Henderson

Hon. John H. Seidel, Judge, Maricopa County
Superior Court
Vivian Kringle, Clerk, Maricopa County
Superior Court
Glen D. Clark, Clerk, Court of Appeals,
Division One

APPENDIX B

Rule 23. Petition for reveiw

23(c) Form and Contents.

The form of the petition or cross-petition for review shall comply with Rule 6(c) and the parties shall be designated as in the Court of Appeals. The petition shall not exceed twenty pages, exclusive of the appendix and shall contain concise statements of the following:

1. A synopsis of the decision of the Court of Appeals. A copy of the decision shall be included in the appendix.

2. The issues presented for review.

3. The facts material to a consideration of the issues presented.

4. The reasons why the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

All references to the record on appeal shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices.

23(d) Transmittal of Partial Record Upon Filing of a Petition for Review.

Upon the expiration of the time for filing a cross-petition for review, the clerk of the Court of Appeals shall transmit to the clerk of the Supreme Court a partial record of the case consisting of the original and all copies of

the petition or cross-petition for review, the original and all copies of the briefs filed in the Court of Appeals, and one copy of the decision of the Court of Appeals.

* * *

23(f) Order Granting Review.

If the Supreme Court grants review, its order shall specify the issue or issues which are to be reviewed. The Supreme Court may order that the parties file additional briefs or that oral argument be heard, or both. If the order granting review does not provide for supplementation of briefs or for oral argument, either party may, within 15 days after the clerk mails notice of the Court's order, request the Court to do so by a motion specifying the reasons for supplementation or for oral argument, or both.

23(g) Transmittal of Remaining Record.

Upon notification by the clerk of the Supreme Court that a petition or cross-petition for review has been granted, the clerk of the Court of Appeals shall transmit the remaining record to the clerk of the Supreme Court.

23(h) Denial of Petitions.

When all petitions and cross-petitions for review have been denied, the clerk of the Supreme Court shall so notify the clerk of the Court of Appeals and the parties, and shall return the original copies of the briefs and the petition or cross-petition for review to the clerk of the Court of Appeals.

APPENDIX C

Rule 24. Issuance of mandates by appellate courts and mandates from United States Supreme Court

24(a) Mandates by Appellate Courts

(1) If there has been no motion for reconsideration and no petition for review filed, the clerk of the Court of Appeals shall issue the mandate at the expiration of the time for the filing of such motion or petition.

(2) If a motion for reconsideration has been filed, the mandate shall not issue until the motion has been disposed of and until the expiration of the time provided by Rule 23 for the filing of a petition for review.

(3) If a petition for review is filed, the clerk of the Court of Appeals shall not issue a mandate until the receipt by the clerk of the Court of Appeals of an order of the Supreme Court denying the petition for review.

(4) If a petition for review is granted by the Supreme Court, the mandate shall be issued by the clerk of the Supreme Court at the appropriate time.

(5) The papers making up the record on appeal transmitted by the clerk of the superior court to the appellate court pursuant to Rule 11(a)(1) shall be returned with the mandate to the clerk of the appropriate court or to the appropriate agency.